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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANA ERIKA AGRILLO LADLAD and
LAWRENCE J. FLEMING,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT J. WEBER,
221 N. LaSalle Street,
Chicago, Illinois 60601,
(312) 782-1983,

Counsel for Petitioners,
Ana Erika Agrillo-Ladlad and
Lawrence J. Fleming.

Keenan Printing Company 312-648-0050 ◀▬▶ 325

QUESTIONS PRESENTED

i —Whether naptha or gasoline soaked newspapers spread on the floor of a building to direct a fire and lighted by a burning newspaper constitute an explosive for the purpose of 18 U.S.C. § 844(j)?

ii —Whether the term "explosive" as used in 18 U.S.C. § 844(i) should be construed to include common law arson where a fire is set with the use of an accelerant and paper "trailers"?

iii —Whether the jury instruction defining "incendiary device" is an accurate statement of law?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Ana Arika Agrillo-Ladlad and Lawrence J. Fleming, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on April 14, 1982.

OPINION BELOW

The opinion of the court of appeals is, as yet, unreported; however, it appears as Appendix A hereto.

PARTIES BELOW

The names of all parties to this proceeding in the court of appeals appear in the caption of the case.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1982. This petition for certiorari is timely filed within 60 days after the entry of judgment in the court below pursuant to Rule 20 of the Rules of the Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

18 U.S.C. § 844(i):

> "(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment as provided in section 34 of this title."

18 U.S.C. § 844(j):

> "(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion."

18 U.S.C. § 232(5):

> "The term 'explosive or incendiary' device' means (a) dynamite or all other forms of high explosives, (b) any explosive bomb, grenade, missile, or similar device, and (c) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone."

STATEMENT OF THE CASE

The judgment below was entered on a verdict of guilty on both counts of a two count indictment charging the defendants, Ana Erika Agrillo-Ladlad (hereinafter referred to as "Agrillo-Ladlad") and Lawrence J. Fleming (hereinafter referred to as "Fleming") with violations of (1) 18 U.S.C. 371 (conspiracy) and (2) 18 U.S.C. § 844(i) (damaging property by means of an explosive).

Agrillo-Ladlad owned United Latino Press (hereinafter referred to as "United Latino"), a commercial printing company which leased approximately one half of the usable space on the sixth floor of a seven story building in Chicago, Illinois. On March 22, 1979, there was a fire in the United Latino space. At that time, Fleming and Jeffrey Bennett (hereinafter referred to as "Bennett") worked for Agrillo-Ladlad.

Bennett, a severed co-defendant, testified at trial for the government and described setting the fire. He said that a 55 gallon drum of naptha was purchased and delivered to United Latino on March 21, 1979; that, at about 1:30 a.m. on March 22, he went to the United Latino office and began placing pieces of newspaper, end to end on the floor in a line. He said that he made three lines, or "trailers", which he laid out so they could be ignited from one point. Bennett said that, after laying out the trailers, he poured naptha on them. He also spilled naptha on himself.

He further testified that, after spreading the naptha, he began to work on an electronic ignition unit; and that the unit was designed to work off a timer and electricity, whereby a flame would be created to pass through the newspaper and ignite the naptha. He said that the flames would then spread along the trailers from the starting point. Bennett testified that, to attach the ignition unit to a camera timer, he had to splice some wires; that he neglected to bring wire splicers with him; that he decided to strip the insulation from the wires by burning them. He testified that he lit a match and began to burn the insulation from the wires; that the match burned too far and he dropped it on the floor, setting himself on fire. He testified that nothing else ignited; that he remained in the office for awhile, attempting to beat out the fire on his

legs, whereupon his hands became burned. He said that no fumes ignited and that he ran out of the office to the hallway where he extinguished the flames by rolling in a rug.

He testified that, after extinguishing the fire on his legs and arms, he returned to the United Latino office; that he ignited a piece of paper and dropped it at the intersection of the trailers. He further testified that he walked out of the office, that he noticed no flames or explosions, that he closed the door and locked it.

Prior to calling Bennett to testify, the government offered the testimony of an investigator from the Chicago Police Department bomb and arson unit. The investigator testified that he was called to the United Latino building on the morning of March 22 where he observed the flames and smoke on the sixth and seventh floors; and that, considering the brown-yellow smoke, the white flame and the even burn he observed inside the building, he concluded that a petroleum distillant-based product was used as an accelerant in the fire. He said that this would result in an "explosive-type" fire of rapid oxidation, meaning that the accelerant ignites simultaneously in a contained area. He identified certain photographs, which he said reflect that there was a primary fire, which was low and that there was a secondary fire which gained more heat after it had oxygen and then burned more severely near the ceiling or upper reaches of the space.

An agent from the Bureau of Alcohol, Tobacco and Firearms also testified for the government, and defined various technical terms and concepts within his expertise. He defined "explosive range" as the range of proper mixture of fuel to air that has the potential of explosion. He said that any accelerant that would have a "flash point" be-

low 100° Fahrenheit would be a flammable liquid and have a potential for explosion; that the flash point of naptha is 50° Fahrenheit; and that the flash point of gasoline is —45° Fahrenheit.

The agent explained how naptha or gasoline can be ignited:

> "The vapors produced are heavier than air and when the vapors are produced, they have a tendency to stay within the immediate area and it's—actually it's an accumulation of vapors that constantly build up and build up, until they're—the proper amount of fuel to air is attained.
>
> • • •
>
> If the proper amount—if it's in proportion— the right proportion of the fuel to air and there is a source of ignition, there will be an explosion."

He then explained the term "rapid flame front" to mean the simultaneous burning of vapors:

> "Q. Now, what—when you describe a "rapid flame-front", what is that phenomenon?
>
> A. That is the explosive *phenomenon*. There is really no difference between an explosive—a rapid flame and explosive—*in high explosives*, such as dynamite and T.N.T. and what-have-you, the detonating velocities are measured in the rate of—by the progression of fire through that material.
>
> Q. And is it measured in the same way *with accelerants*—in the explosive range?
>
> A. Not in the same way, but it's the same—same *phenomenon*." (Emphasis supplied).

By way of summary, the agent recognized the distinction between high explosives, such as dynamite and T.N.T., and accelerants which may produce a rapid flame front.

The agent testified that, in his opinion, the combination of the trailers, the chemical accelerant and the source of ignition constituted an "incendiary device."

On cross-examination, the agent testified that, when Bennett dropped the burning paper on the naptha, two things could have happened: 1) ignition of burning of the accelerant or 2) the explosive phenomena—the rapid flame front would progress from that point. The agent said that, in his opinion, every rapid burning is "an explosive phenomena"; that fire is "an explosive phenomena" at the lowest possible range and detonation is "an explosive phenomena" at the highest possible range; that certain chemicals and compounds, such as dynamite and T.N.T., are explosives, by themselves; and that naptha has an explosive *potential* only when it is within the flammable limits, or the mix with air is in the range of .9% to 6.7%. The agent testified that, in the strictest sense of the word, every fire is an explosion because any material capable of oxidation can explode. He cited the example of methane gas being released from grass clippings as being an explosive.

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Conflict With The Decision Of The Ninth Circuit Court Of Appeals On The Same Matter

The petitioners were convicted of conspiracy to damage and destroy, by means of an explosive, property used in an activity affecting interstate commerce. They were also convicted of the substantive offense under 18 U.S.C. § 844(i). The testimony reflects that Bennett laid out layers of newspapers, connecting the major pieces of shop equipment to a central ignition point. After the papers

were laid out, Bennett poured naptha on them and began to assemble an ignition unit. In doing so, he struck a match and ignited the naptha which had dripped onto his clothing. After he extinguished his burning clothing, he lit a piece of newspaper which he dropped on the central ignition point. The fire spread across the trailers to the different pieces of machinery, some of which was owned by United Latino and on which it carried insurance. As noted by the court below, the question presented is whether naptha soaked newspapers strategically spread across the floor of a building for the purpose of directing a fire and ignited by a newspaper is a "explosive" or "incendiary device," as defined in 18 U.S.C. § 844(j) and 18 U.S.C. § 232(5). After reviewing the language of Title XI of the Organized Crime Control Act of 1970, the legislative history of the Act, the testimony at trial and case law, the court below held that the naptha soaked newspapers constitute "an explosive".

Similarly, in *United States* v. *Gere*, 662 F. 2d 1291, 1295-6 (9th Cir. 1981) (See Appendix B) the court had to determine whether "trailers", soaked with photo-copy fluid, constitute "an explosive" within the meaning of 18 U.S.C. § 844(j). The Ninth Circuit, relying upon the language of the Title XI, legislative history and congressional intent, determined that the fluid soaked trailers were not "explosives".

In *United States* v. *Birchfield*, 486 F. Supp. 137 (W.D. Tenn. 1980), the alleged "explosive" consisted of a gasoline soaked floor on to which the defendant was accused of throwing a burning piece of paper. The trial court dismissed the indictment, finding that the spreading of gasoline throughout a building does not create an "explosive" within the meaning of 18 U.S.C. § 844(i).

In conclusion, there is a clear, substantial and direct conflict between the decision below and that of the Ninth Circuit in *United States* v. *Gere*, 662 F. 2d 1291, 1295-6 (9th Cir. 1981), and that of the court in *United States* v. *Birchfield*, supra. To resolve this, a Writ of Certiorari should be issued.

II.

THE DECISION BELOW SANCTIONS THE UNINTENDED AND UNWARRANTED EXTENSION OF TITLE XI WHEREBY EVERY ARSON INVOLVING A BUILDING CONTAINING A BUSINESS AFFECTING INTERSTATE COMMERCE WILL CONSTITUTE AN EXPLOSION.

In *United States* v. *Gere*, 662 F. 2d 1291, 1295-6 (9th Cir. 1981), the Ninth Circuit touched upon the impact of an overly broad interpretation of the word "explosive" as used in 18 U.S.C. 844(i). The court characterized the acts of the defendant in *Gere*, supra, as arson. This corresponds to the reasoning of the court in *United States* v. *Birchfield*, 486 F. Supp. 137 (N.D. Tenn. 1980), where it was noted that the use of trailers to spread or direct a fire is common to arson. Even in the instant matter, there was expert testimony that every fire is an explosion because any material capable of oxidation can explode. Agent Cousins, testifying for the government cited the example of methane gas being released from grass clippings as being an explosive.

In the same vein, an investigator from the Chicago bomb and arson unit testified that in the instant matter there was a primary fire, which was low, and then a secondary fire which gained more heat after it had oxygen. This secondary fire, after the build up of heat, often causes an explosion in that windows are blown out.

Based upon the above, every enclosed burning—i.e. the burning of the inside of a building—will, if allowed to reach a certain temperature, result in an explosion. Therefore, every arson of a commercial building will be a violation of 18 U.S.C. § 844(i).

This is not the plain meaning of the statute nor was it the intent of Congress. In 1970 *U.S. Code Cong. and Adm. News*, p. 4011, it is stated:

> "This title (Title XI), added by the committee, establishes Federal controls over the interstate and foreign commerce of explosives and is designed to assist the States to more effectively regulate the sale, transfer and other disposition of explosives within their borders.
>
> • • •
>
> In addition to the Federal regulatory scheme, title XI strengthens the Federal criminal law with respect to the illegal use, transportation or possession of explosives. Under this part of the title, the definition of explosives is broadened to include incendiary devices such as 'Molotov cocktails'."

The congressional intent in adopting Title XI is stated as follows:

> "Bombings and the threat of bombings have become an ugly, recurrent incident of life in cities and on campuses throughout our Nation. The absence of any effective State or local controls clearly attest to the urgent need to enact strengthened Federal regulation of explosives.
>
> • • •
>
> Among other matters, the hearing record discloses that between January 1, 1969, and April 15, 1970 . . . law enforcement officials reported a total of 4,330 bombings, 1,475 attempted bombings, and 35,129 threatened bombings. The Department of Treasury

> spokesmen indicated that in this period such bombing outrages were responsible for the death of 40 persons and approximately $22 million of property damage." 1970 U.S. Code and Adm. News, p. 4013-4.

Further in the section analysis, and regarding the definition of explosives as found in Section 844(j), it is stated:

> "Section 844(j) sets forth the definition of 'explosive' for the purposes of Section 844(d) through (i). The use of the separate definition is for the purpose of including incendiary devices within the coverage of Section 844 (d) through (i), and to make the exceptions applicable to the regulatory provisions of this chapter inapplicable to these sections. 1970 *U.S. Code Cong. and Adm. News,* 4047. (Emphasis supplied)

The statements of the legislators during the congressional debates are even more helpful in removing any ambiguity. On April 23, 1970, Congressman Emanuel Celler, Chairman of the House Judicary Committee which studied the House version of Title XI, introduced the legislation into the House saying:

> "[The bill] is in response to a series of recent bombing outrages and bomb threats in various parts of the Nation." 116 *Cong. Rec.* 12989.

In his statement to the House, Congressman Celler said that the definition of explosives contained in the bill expands the definition presently contained in the Federal Criminal Code to include incendiary bombs, grenades and similar devices. 116 *Cong. Rec.* 12990.

On July 21, 1970, Senator Hruska introduced S.B. 4107 which is a predecessor of Title XI. He expressed concern regarding the rash of bombing incidents across the county and cited the bombing statistics given above. In explaining the definition of the word "explosives", Senator Hruska said:

> "The critcal definitions are: 'explosive materials' which means, briefly any chemical compound the primary or common purpose of which is to function by explosion; . . ." 116 *Cong. Rec.* 25155.

During the debate on October 6, 1970, Congressman Kleppe said:

> "In conclusion, I want to commend the members of the House Judiciary Committee for including title XI, the administration's proposals to halt the rash of bombings across the Nation." 116 *Cong. Rec.* 35207.

The debate continued on October 7, 1970, at which time Congressman Mayne, a co-sponsor and lead-off witness on behalf of the House version of title XI, said:

> "Title XI of the bill also finally includes the much needed antibombing provisions requested by the President. I am proud to have been one of the original sponsors of the antibombing provisions of the Act, having introduced the original bill to strengthen our laws concerning illegal use, transportation or possession of explosives. . . ." 116 *Cong. Rec.* 35300.

Congressman Hogan also spoke on behalf of Title XI;

> "One of the most important aspects of the bill is that dealing with bombing.
>
> Since the middle of 1969 an unprecedented waive of explosive bombings has occured across the Nation. The targets of these terroristic acts include almost every type of public and private institution, but the attacks have concentrated most heavily on police stations, court buildings, corporate offices, military facilities, and college campuses." 116 *Cong. Rec.* 35305.

In *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, 640 (1967), this Court said:

> "It is the sponsors that we look to when the meaning of the statutory words is in doubt."

In *Rewis* v. *United States*, 401 U.S. 808, 811 (1970), the Court gave great weight to what the legislators did *not* say:

> "In addition, we are struck by what Congress did not say. Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limted federal police resources, and might well produce situations in which the geographic orign of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of § 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State."

In *Holy Trinity Church* v. *United States*, 143 U.S. 457, 463, this Court said:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

Current events then are relevant, and are especially important to the resolution of the issue involved here. The statements of the members of Congress concerning bombings evidences the mood of Congress. What was not said

during the Congressional debates is also important. Nowhere is the word "arson" used, and none of the many statistics cited throughout the debates included the more common crime of arson.

Probably determinative of the issue is the silence of Congress when it is recognized that arson has traditionally been left to the States to prosecute. If it were the intent of Congress to alter this traditional relationship, certainly someone would have said something. Yet, there is nothing.

It is universally accepted that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. *Rewis* v. *United States,* 401 U.S. 808, 812 (1971); *United States* v. *Campos-Serrano,* 404 U.S. 293, 297 (1971); *United States* v. *Bass,* 404 U.S. 336, 347 (1971). In *Bass,* supra, this Court said:

> "In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in a language that is clear and definite.'
>
> • • •
>
> Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."

In analyzing which of two or more interpretations to attach to an ambiguous statute, the factor of the Federal-State balance comes into play. In *United States* v. *Bass,* 404 U.S. 336, 349, the court discussed this as follows:

> "There is a second principle supporting today's result: Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. Congress has traditionally been

> reluctant to define as a Federal crime conduct readily denounced as criminal by the States. This Congressional policy is rooted in the same concepts of American Federalism that had provided the basis for judge-made doctrines. [case cited] As this Court emphasized only last term in *Rewis* v. *United States,* 401 U.S. 808 (1970)], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between Federal and State criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the Federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." Accord: *U.S.* v. *Birchfield,* 486 F. Supp. 137, 138-9 (M.D. Tenn. 1980)

In conclusion, the expansion of the definition of the term "explosive" to include arson is unwarranted, and wil' result in an unintended expansion of federal criminal regulation. Because of the magnitude and potential impact of this issue, this Court should issue a writ of certiorari.

III.

THE JURY INSTRUCTION DEFINING "EXPLOSIVE" CONTAINED AN INCORRECT STATEMENT OF LAW.

The jury was instructed as follows:

> "The term 'incendiary device' means any incendiary bomb or grennade (sic), fire bomb or similar device. Any article or device composed of a combustible material capable of producing sufficient heat to destroy property of any kind and having components designed to ignite that combustible material is under the laws an incendiary device."

• • •

"The term 'explosive' means:

(1) an incendiary device; or (2) any chemical compound, mechanical mixture or device that contains any combustible units or other ingredients in such proportions, quantities or packing that ignition by fire of the compound mixture or device or any part thereof may cause an explosion." Government Instruction 38.

The term "incendiary device," as defined in 18 U.S.C. § 232(5), is divided into three categories:

(a) dynamite and high explosives;

(b) any explosive bomb, grenade, missile or similar device; and

(c) an incendiary bomb, fire bomb or similar device, which:

(i) consists of a breakable container, including a flammable liquid and wick; and

(ii) is portable.

Here, the plain meaning of the words "incendiary device" is readily ascertainable. The device may be dynamite or a high explosive. Naphtha and gasoline spread on trailers across the floor do not qualify as they are not dynamite nor explosives, but flammable liquids.

Naphtha or gasoline spread on trailers across the floor of a room are not bombs, grenades, missiles or similar devices. The clear intent of this provision is to ban portable explosives. Nor can the government rely upon the general term "or similar devices," for under the doctrine of *ejusdem generis*, general words following the specific take their meaning and are limited by the specifics. *U.S.* v. *Baranski*, 484 F. 2d 556, 566 (7th Cir. 1973).

Finally, naphtha or gasoline spread on trailers across the floor is not an incendiary bomb, fire bomb or similar de-

vice which consists of a breakable container and is portable. There is, then, no reasonable interpretation of the facts here which justify the presentation of the "incendiary device" theory to the jury.

Furthermore, the government's instruction is overly broad in that it included within the definition anything composed of a) combustible material and b) a method of ignition. The concept of unity or portability contained in the statute is totally lacking. In *United States* v. *Birchfield*, 486 F. Supp. 137, 139 (M.D. Tenn. 1980), the Court said:

> "The statute requires the destruction of a building by means of an incendiary device, a requirement that implicitly contemplates a separation of identity between the means of destruction (an explosive) and the object of destruction (a building). For this reason, the government's theory that Rene's Furniture Store enjoyed a sort of dual existence as both "building" and "explosive" for the purposes of section 844(i) must be rejected."

This Court, in *Bollenbach* v. *United States*, 326 U.S. 607, 613 (1960), said that a conviction ought not to rest on an equivocal direction to the jury on a basic issue. In *United States* v. *Donnelly*, 179 F. 2d 227, 233 (7th Cir. 1950), the court reversed a conviction because the jury was given conflicting instructions: one erroneous and prejudicial; the other correct.

The definition of incendiary device, which was given to the jury, was a misstatement of law. Because the jury was given one incorrect definition of an essential element of the offense charged, the jury may have returned its verdict based upon that incorrect definition. This Court should determine the correct definition of "incendiary device" by limiting it to those acts intended by Congress to be regulated, and for that purpose a writ should be issued.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ROBERT J. WEBER,
221 N. LaSalle Street,
Chicago, Illinois 60601,
(312) 782-1983,

Counsel for Petitioners,
Ana Erika Agrillo-Ladlad and
Lawrence J. Fleming. .... ..

May, 1982

APPENDICES

APPENDIX A

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 80-2822 & 80-2826
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANA ERIKA AGRILLO-LADLAD,
and LAWRENCE J. FLEMING,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois.
No. 80 CR 387—Frank J. McGarr, *Judge.*

Argued September 14, 1981 — Decided April 14, 1982

Before BAUER, *Circuit Judge,* FAIRCHILD, *Senior Circuit Judge,* BAKER, *District Judge.**

BAKER, *District Judge.* The defendants, Ana Erika Agrillo-Ladlad and Lawrence J. Fleming, were convicted under 18 U.S.C. § 371 of conspiracy to damage and destroy, and attempting to damage and destroy, by means of an

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* Honorable Harold A. Baker, District Judge for the Central District of Illinois, sitting by designation.

explosive, property used in an activity affecting interstate commerce. They were also convicted of the substantive offense under 18 U.S.C. § 844(i). A confederate, Jeffrey D. Bennett, was also indicted but plead guilty and became a witness for the government.

On appeal, Agrillo-Ladlad and Fleming contend that 18 U.S.C. § 844(i) is not applicable to the facts of this case and that the defendants were improperly convicted under that statute. We affirm.

I.

The defendant, Ana Erika Agrillo-Ladlad, owned United Latino's Press, (United Latino's) a commercial printing company located on the east half of the sixth floor of 213 West Institute Place in Chicago, Illinois. Agrillo-Ladlad employed the defendants Fleming and Bennett. Fleming was the shop manager and Bennett ran the folding machine and did occasional electrical work. The defendants conspired together to destroy the business and to collect the proceeds of the fire and casualty insurance covering the business.

On March 22, 1979, at about 1:30 A.M., Bennett entered the basement at 213 West Institute Place and disconnected United Latino's fire alarm and sprinkler system. Bennett then went to the sixth floor and began to lay out layers of newspapers in rows, or trailers,[1] connecting the major pieces of shop equipment to a central ignition point. After he had laid out the rows of newspapers,

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1. According to an expert witness for the government, a trailer is a combustible material that is used to spread and direct fire in a particular pattern. Here the naphtha soaked rows of newspapers constituted trailers.

Bennett poured naphtha on them using a bucket and the contents of a fifty-five gallon drum of naphtha which had been purchased and delivered to United Latino's the day before. The process of laying out the newspapers and saturating them with naphtha took about 2½ hours. During the whole period of time the windows in the United Latino's premises were closed and the ambient temperature was between 55 degrees and 60 degrees Fahrenheit.

Bennett then began to assemble an electronic ignition unit which, connected with a timing device, would pass a flame through the newspapers and ignite the naphtha. He had to strip the insulation from some wires. Since he did not have wire strippers, Bennett struck a match to burn off the insulation, whereupon the naphtha that Bennett had spilled on his clothing caught fire and Bennett ran from the pressroom and extinguished the flames by rolling in a hallway rug, but only after sustaining burns on his hands and legs.

Bennett returned to United Latino's pressroom and ignited a piece of newspaper by holding it in the electric arc of an arc light. He carried the burning paper to the junction point of the three trailers and dropped it on the trailers. Bennett then left the United Latino's premises closing and locking the door behind him. Apparently Bennett went to a nearby police station and told the police he thought there was a large fire on Institute Place.

Within fifteen minutes the Chicago Fire Department was at the scene and engineer Robert Popjoy observed that the windows had blown out of United Latino's and that flames were emanating from them. After entering the premises Popjoy saw almost total destruction, bent pipes, charred and blown out windows, and warped, bent and twisted office equipment. A chandelier on the floor above was almost completely melted.

Inspector Thomas Kerner of the Chicago Bomb and Arson Squad testified for the government. From his observation of the United Latino's premises, Kerner believed that an accelerant had been spread about the premises and that vapors from the accelerant had been contained in the lower portions of the room either by the heat or humidity of the room, and that the vapors had been simultaneously ignited in an "explosive-type fire of rapid oxidation."[2]

Thomas Cousins, an enforcement officer of the Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., testified as an expert witness for the government. Cousins testified that both naphtha and gasoline are potential explosives. It was Cousins' opinion that an uncontained explosion had occurred at United Latino's and that the uncontained explosion had been a simultaneous ignition of a vapor envelope which formed above the naphtha soaked trailers. Cousins was of the further opinion either that a contained explosion caused by ignition of the accelerant vapor build-up in the office area took place and blew out the windows, or that the explosion was caused by the natural phenomenon of heat build-up in an uncontained flash fire causing a "flash over" which blew out the windows and vented the fire. Under either possibility there was an explosion.

Cousins explained how over fifty gallons of naphtha spread over rows of newspapers to all major equipment at United Latino's and into the office area would explode

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2. Rapid oxidation, according to Kerner, means that the accelerant ignites almost simultaneously. (Record, vol. 2, at 108). When a liquid accelerant simultaneously ignites, Kerner said, it explodes. (Record, vol. 2, at 111-12).

when set on fire. At night the temperature in United Latino's was between 55 degrees and 60 degrees Fahrenheit. Cousins explained that just above the flash point[3] of naphtha, which is 50 degrees Fahrenheit, naphtha generates sufficient vapors which, when mixed with a certain percentage of air, form a potentially explosive mixture. "The vapors produced," Cousins explained, "are heavier than air and when the vapors are produced, they have a tendency to stay within the immediate area and . . . build up and build up, until . . . the proper amount of fuel to air is attained." (Record, vol. 7, at 981-82). It was Cousins' opinion that more than fifty gallons of naphtha would give off sufficient vapors to form an explosive potential, when spread along paper trailers to equipment and into the office area of United Latino's in a temperature of above 50 degrees Fahrenheit and when combined with the air around it. Those vapors, when ignited by a flaming newspaper, could have exploded. After examining photographs of the damaged United Latino's, Cousins described the photographs as depicting the aftermath of an "explosive phenomenon." (Record, vol. 7, at 985).

II.

The question that confronts us is whether naphtha soaked newspapers strategically spread across the floor of a building for the purpose of directing a fire and ignited by a burning newspaper is an "explosive" or "incendiary device" as defined in 18 U.S.C. § 844(j) and 18 U.S.C.

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3. According to Cousins, the flash point is the lowest temperature at which a flammable liquid forms vapors which can ignite. The flash point occurs just below the explosive range of any flammable liquid. (Record, vol. 7, at 978).

§ 232(5) for the purpose of prosecution under 18 U.S.C. § 844(i).

The government has two theories: first, that the defendants used a "chemical compound, mechanical mixture or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, . . . that ignition by fire . . . of the compound, mixture or device or any part thereof may cause an explosion," 18 U.S.C. § 844(j); second, that naphtha soaked newspapers are a device similar to an "incendiary bomb." 18 U.S.C. § 232 (5)(C). Agrillo-Ladlad and Fleming argue that Congress did not intend the term "explosive" as used in 18 U.S.C. § 844(i) to include devices such as naphtha soaked trailers.

III.

The plain meaning of the language of Title XI of the Organized Crime Control Act of 1970, the legislative history of the Act, the testimony at trial of Thomas Cousins, and the case law all support the government's position that naphtha soaked newspapers constitute an explosive under the terms of the Act. Pub. L. No. 91-452, 84 Stat. 922 (1970). The device used by defendants contained an "oxidizing" unit, the air in United Latino's. The device contained a "combustible" unit, the naphtha vapors, trailers of newspapers, and a rolled newspaper. The "quantities" of the oxidizing unit and combustible unit caused an "explosion" when Bennett ignited the device "by fire." The defendants argue, however, that the spreading of naphtha on the trailers was not a proportioning, mixing or packing as those terms are commonly used.

In determining whether Congress intended to exclude naphtha soaked trailers from the term "explosives," the language used in Title XI of the Organized Crime Control

Act of 1970 must be studied. 2A J. Sutherland, Statutes and Statutory Construction § 45.05, at 16 (4th ed. 1973). Title XI provides two independent definitions of the term "explosives."

Section 844, subsections (d) through (i) of Title XI created new federal criminal offenses for maliciously using or attempting to use or threatening to use explosives against proscribed targets, including commercial properties. Section 844(j) defines the term "explosive" for purposes of section 844(i) and other sections dealing with the malicious use of explosives:

> For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonaters, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this Title and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. § 844(j).

Section 232(5), which section 844(j) incorporates by reference further defines the term "explosive or incendiary device" as follows:

> The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire

bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

18 U.S.C. § 232(5).

Section 841(d) of the Act gives a much narrower definition of the term "explosives" for the purpose of regulating the traffic of explosives.[4]

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4. 18 U.S.C. § 841(d) provides:

Except for the purposes of subsections (d), (e), (f), (g), (h), (i), and (j) of § 844 of this title, "explosives" means any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion; the term includes, but is not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonaters, safety fuses, squibs, detonating cord, igniter cord, and igniters. The Secretary shall publish and revise at least annually in the Federal Register a list of these and any additional explosives which he determines to be within the coverage of this chapter. For the purposes of subsections (d), (e), (f), (g), (h), and (i) of § 844 of this title, the term "explosive" is defined in subsection (j) of such § 844.

Ammonium nitrate and gasoline in a separate state are not regulated explosives since their common purpose is not exploding. *Hearings on H.R. 16699, H.R. 17154, H.R. 18573 Before Subcomm. No. 5 of the Comm. on the Judiciary,* House of Rep., 91st Cong., 2d Sess. at 157 (1970), (App. to letter from Hollis M. Dole, Ass't Sec. of the Int.); *accord* H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. at 70, *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4041.

When the language of a statute is unambiguous, judicial inquiry ordinarily is at an end. *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980). Despite the seeming clarity of section 844(j), the legislative history of the Organized Crime Control Act should be examined to determine whether an extension of federal involvement is warranted. *See United States* v. *Enmons*, 410 U.S. 396, 411 (1973). The hearings held by Subcommittee No. 5 of the House Committee on the Judiciary and the report of the House of Representatives supports the government's position that, when used with malicious intent, petroleum distillates mixed with air at normal ambient temperatures have an explosive potential and that the naphtha impregnated device used in this case falls within the definition of explosives.

Congress provided two separate definitions for the term explosive "for the purpose of including incendiary devices within the coverage of section 844(d) through (i), and to make the exceptions applicable to the regulatory provisions of this chapter inapplicable to these sections." H.R. Rep. No. 91-1549, 91st Cong. 2d Sess. at 70, *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4047. During the hearings, members of Congress repeatedly expressed concern with respect to the difficulty in controlling the malicious use of common materials such as gasoline, other flammable liquids, and ammonium nitrate without overburdening sportsmen, farmers, and people engaged in legitimate manufacture, transportation, distribution and use of such materials. Two bills were considered. One, Congressman Celler's bill, H.R. 17154, had a broad definition of explosive. The other, an administration bill, H.R. 18573, had a narrower definition of explosive. *See, e.g., Hearings on H.R. 17154, H.R. 16699, H.R. 18573 Before*

SubComm. No. 5 of the Comm. on the Judiciary, House of Rep., 91st Cong. 2d Sess. at 64, 106, 133 (1970).[5]

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5. Hearings before Subcomm. No. 5 of the Comm. on the Judiciary, House of Rep. at 64 (statement of Ass't Attorney General Will R. Wilson):

> [I]n the composition of some of these things gasoline is used, in a Molotov cocktail, and there is another type of useable device where they take an open container of gasoline and put it on a cook stove with the pilot light. It will furnish enough heat to evaporate the gasoline and if the room is closed it will finally develop a combustible mixture in the atmosphere and the pilot light will ignite it and then the whole room will explode, so you can leave an open container of gasoline on a cook stove and make a bomb out of it that way.

Id. at 64; *see also id.* at 106 (statement of David Steinberg, Ex. Dir., Nat'l Council for a Responsible Firearms Policy, Inc.).

Statement of Hollis M. Dole, Ass't Sec. of the Int., comparing H.R. 17154 and H.R. 18573 with regard to the definition of explosives:

> H.R. 17154 includes "any chemical compound . . . . that contains . . . . ingredients in such proportions, quantities or packing that ignition by fire . . . . or by detonation . . . . may cause an explosion." This would include any highly flammable substance such as *gasoline, cleaning fluids and many other commercial solvents. It also includes ammonium nitrate which is a widely-used commercial fertilizer.*
>
> H.R. 18573 does not cover ammonium nitrate or gasoline in a separate state since the common purpose of these two substances by themselves is not to function by explosion. When ammonium nitrate and fuel oil are mixed together, however, they become a very common explosive known to industry as a "blasting agent," and are covered by H.R. 18573.

(Footnote continued on following page)

The bill which emerged from the committee spoke to these concerns. The bill adopted the language of the administration bill in its definition of "explosives" for the regulatory provisions and added certain exclusions. For the provisions relating to the malicious use of explosives, the bill adopted the broad definition of the term "explosives" contained in the Celler bill.

In the hearings Congressmen expressed special concern about the damage to federally owned buildings caused by arson. In testimony explaining the administration bill, Assistant Attorney General Will R. Wilson noted that federal jurisdiction had already entered into the area of arson: "Existing law furnishes a basis for Federal investigative and prosecutive action in certain cases of destruction or threats of destruction by arson . . . . [h]owever, it is inadequate in many important ways." *Id.* at 35; *see also id.* at 324.

In addition to the Congressmen's recognition that Title XI could apply in instances of arson, the legislative history indicates that Congress clearly anticipated an overlap in federal and state jurisdiction. The House Report de-

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5. *continued*

Id. at 157 (emphasis added) (App. A, letter from Hollis M. Dole [Aug. 19, 1970]).

Chairman Celler observed that "the definition of 'explosive' . . . may create most of our difficulty. We need all the enlightenment we can get to get a good definition of explosives." *Id.* at 299. With respect to the testimony by explosive experts, Chairman Celler pointed out that, "We had chemical experts testify that 'explosives' is a pervasive term. The testimony was to the effect that an explosive could be made out of material in this very room. If the word explosive is so pervasive it could be extremely difficult to enforce a section proscribing mere possession." *Id.* at 307.

scribed the purpose of Title XI as "to assist the States to more effectively regulate the sale, transfer and other disposition of explosives within their borders." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. at 36, *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4011. In his statement explaining the administration bill, Assistant Attorney General Wilson addressed this overlap as follows:

> We recognize that the provisions of this bill will, to a large extent, cover areas presently covered by State law. We do not intend that the Federal Government substitute for the enforcement activities of State and local authorities in this area. We have, therefore, included in the bill a provision, subsection (h), generally similar to present section 837(e), expressing Congress' intention that this statute not be construed as preempting State law or depriving State or local law enforcement authorities of their responsibilities for investigating and prosecuting crimes involving the use of explosives.
>
> Indeed, it is evident that the Federal investigative and prosecutive authority contained in this bill must be used selectively. *The provisions of the bill have been drawn broadly, so that prosecutions need not hinge on such essentially artificial issues as whether the explosives were moved across State lines. However, the bill's prohibitions cover many acts of violence of predominantly local concern.* It is not intended that Federal law enforcement authorities should investigate and prosecute every bomb threat or incident. Indeed, we do not have the resources to do so. . . . This flexibility will enable us to achieve maximum economy of effort and to assure that Federal law enforcement assists but does not displace the efforts of State and local officials in dealing with crimes involving explosives.
>
> . . . Nor is it a substitute for vigorous State action. It is, however, necessary to give us the tools we need

to prosecute the terrorist and I urge your prompt and favorable action.

Hearings on H.R. 17154, H.R. 16699, H.R. 18573 Before Subcomm. No. 5 of the Comm. on the Judiciary, House of Rep., 91st Cong., 2d Sess. at 34, 38 (1970) (emphasis added).[6]

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6. *See also id.* at 60-61 (colloquy between Mr. Wilson and Mr. McCulloch):

> Mr. McCulloch . . . . I hope the story is read that there is a lack of explosives regulation in at least 32 States of the Union.
>
> Mr. Wilson . . . . I might say that practically all the States have an *arson* law, so that if a fire results they can come at it that way. Most of them have some type of prohibition of malicious explosions.
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> • • •
>
> Mr. McCulloch . . . . The lack of vigor of some States may be one of the reasons why, as reluctant as we are to have the Federal Government take on greater responsibility for the enforcement of the criminal law, it may be necessary to do that what they should do. I refer again to my State of Ohio not having a proscription on some of these things. (emphasis added).

See also id. at 61 (colloquy between Mr. Wilson and Mr. Rodino):

> Mr. Rodino: Mr. Wilson, I have before me a news article from the *New York Times*, dated April 20, 1970, which makes reference to some 20 explosions in 4 months in Seattle, Wash. The article goes on to say that city officials requested help from the Federal Bureau of Investigation. "The request for assistance from the FBI appeared routine enough at the outset, but that, too, has turned into a controversy that has further disturbed worried residents. The FBI has

(Footnote continued on following page)

6. *continued*

refused to enter the investigation saying that it has no further jurisdiction. City officials disagree."

I am wondering, first of all, does this bill, H.R. 16699, cover a situation such as this? If it is true that the FBI could not have interceded because they lacked jurisdiction, and the matter couldn't be resolved on the Federal level, will the bill that we have before us counter the situation?

Mr. Wilson: It would expand the basic jurisdiction of the Federal Government, and consequently the FBI in these things.

See also id. at 69 (Representative Poff):

Mr. Poff: Thank you. Mr. Chairman, I want to record myself as sympathetic with the sentiments the chairman expressed a moment ago with respect to those situations which involve a duality of jurisdiction. . . . In most cases, even if this legislation were passed in its present form, the conduct involved would be subject to the proscription of a specific explosive, arson, or anti riot statutes of the State.

See also id. at 72-73 (Zelenko, General Counsel, and Mr. Wilson):

Mr. Zelenko . . . . [P]age 4 of H.R. 16699, subparagraph (f) proposes to make a Federal crime of what I gather is now a State crime in just about every jurisdiction of the country; that is, the malicious damage and destruction of any business property.

Now, if Federal resources are limited why propose such a broad Federal statute in an area where State criminal law already applies?

Mr. Wilson . . . . [T]he whole enforcement here would be limited to rather selective situations and we do not have the resources to undertake this across the board, but this would give us the jurisdiction where we need it in a particular situation that we don't have now, and we do feel the need for that.

The legislative history indicates that Congress intended to define broadly the term "explosive" for purposes of the malicious use of explosives section of the Organized Crime Control Act; that Congress realized that state and federal jurisdiction would overlap in certain instances, such as arson cases; and that simple devices using common substances could be used to create an explosive within the meaning of the Act. The legislative history supports the plain meaning of the language contained in the Act. Moreover, the legislative history supports the proposition that naphtha soaked newspapers when ignited by fire are an explosive for purposes of the malicious use provisions of the Act.

IV.

The Eighth Circuit, the Tenth Circuit and the Eleventh Circuit have had occasion in recent decisions to pass upon the validity of prosecutions under section 844(i). In *United States* v. *Hepp*, 656 F. 2d 350 (8th Cir. 1981), a random mixture of air and methane gas was held to be an explosive within the meaning of 18 U.S.C. § 844(j). In *Hepp* the defendant and his friends were gathered in the defendant's gas station drinking and taking turns shooting a muzzle loading pistol. The defendant Hepp shot a hole in the nature gas (methane) meter in the basement of the station. When one of the drinking party turned the gas off, Hepp directed that it be turned back on and opened a window at the top of the stairs leading to the basement. Hepp then left the filling station on a service call and during his absence the mixture of methane gas and the surrounding air was ignited by a spark of unknown origin resulting in an explosion which destroyed the filling station. In rejecting Hepp's contention that the methane gas air mixture was not an explosive within the meaning of

18 U.S.C. § 844(j), the Eighth Circuit relied both on the uncontroverted opinion of the government's expert witness that methane and oxygen are a mechanical mixture and upon the language of the statute. *Id.* at 352-53. The court also noted that the legislative history of the statute indicated that the exceptions applicable to the regulatory provisions of the statute were not applicable to its criminal sections.

In *United States* v. *Hewitt*, 663 F. 2d 1381 (11th Cir. 1981), gasoline poured into a closed room through a chimney was held to be an explosive within the meaning of 18 U.S.C. § 844(j). A homemade delayed ignition device consisting of a cigarette inserted into a matchbox suspended by a thread into the gasoline laden atmosphere was found to be an incendiary device within the meaning of 18 U.S.C. § 844(j). The court relied for its ruling upon the testimony of expert witnesses, the plain meaning of the statute, and cited *United States* v. *Hepp*, 656 F. 2d 350 (8th Cir. 1981).

In *United States* v. *Poulos*, slip. op. 80-1574 (10th Cir. Jan. 7, 1982), the court held a mixture of gasoline and air was an explosive within the meaning of 18 U.S.C. § 844(j). In *Poulos* a government witness, who had been solicited by the defendant to destroy an office in a commercial building, testified that he stuffed styrofoam into two one-liter cola bottles and then filled the bottles with gasoline. He entered the premises to be destroyed and put one bottle down in the center of the room and began pouring the contents of the other bottle around a small back room of the two room office. Just as he had almost emptied the contents of the bottle of gasoline the fumes were ignited by the pilot light of a water heater and, as the government witness said, "it went whoom." The witness also testified that he had brought along a fuse device that he intended to use in conjunction with a cigarette

to ignite the fumes after the witness had left the premises. In determining that gasoline mixed with air was an explosive, the court relied upon the plain meaning of the statute. *Id.* at 5-6.

The Ninth Circuit, however, in *United States* v. *Gere*, 662 F.2d 1291 (9th Cir. 1981), reversed the conviction of a defendant convicted under 18 U.S.C. § 844(i) in connection with the arson of the building which housed the defendant's business. The fire was set by the use of trailers soaked with photocopier fluid leading from inside the building to an ignition point outside. The trailers, the court found, were, in effect, fuses running from the point of ignition into the warehouse. In *Gere* it does not appear that the trailers played any part in saturating the air within the warehouse building with an explosive substance, nor does there appear to have been any expert witness testimony that there was an explosion in connection with the burning. Moreover, the opinion does not discuss the legislative history of 18 U.S.C. § 844(i), (j). Instead, the decision relies on the cross-reference in section 844(j) to 18 U.S.C. § 232(5) and holds that federal jurisdiction should not be broadened to reach arson cases such as *Gere*.

In *United States* v. *Birchfield*, 486 F.Supp. 137 (N.D. Tenn. 1980), the district court held that 18 U.S.C. § 844(i) did not apply to a case in which a flaming piece of paper was thrown into a building which had been soaked with gasoline. The district court advanced four reasons for its decision: first, the case presented a common situation of arson; second, the legislative history of section 844(i) in no way indicated any Congressional intent to extend federal jurisdiction over arson cases; and third, principles of statutory construction require that criminal statutes be strictly construed. In light of our discussion of the legislative history of 18 U.S.C. § 844(i), (j) and the plain

meaning of the statutory language none of these reasons in *Birchfield* is persuasive.

The fourth reason advanced in *Birchfield* was that the Michigan Court of Appeals has held under a similar Michigan statute that gasoline was not an explosive. This fourth reason also is not persuasive. The Michigan case relied on, *People* v. *Robinson*, 37 Mich. App. 15, 194 N.W. 2d 436, *aff'd*, 387 Mich. 770 (1971), is easily distinguished. The Michigan Court of Appeals was interpreting a Michigan penal statute which did not define "explosives." The Michigan Court looked to the State's Motor Vehicle Code which defined the term "explosives" to mean "any chemical compound or mechanical mixture that is *commonly used or intended* for the purpose of producing an explosion . . . ." *Id.* at 18; 194 N.W. 2d at 437 (emphasis added). *Robinson* relied upon the "commonly used or intended" requirement to hold that gasoline was not an explosive.[7]

V.

The defendants argue also that the trial court erred in permitting the jurors to consider whether the naphtha soaked newspapers used in this case were an incendiary device. The defendants contend that because the trial court gave the jurors an instruction based upon an erroneous theory, there must be a reversal. *United States* v. *Donnelly*, 179 F.2d 227, 233 (7th Cir. 1950).

Under section 232(5), which section 844(j) incorporates by reference, an incendiary device is "any incendiary

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7. The restrictive language defining "explosives" in the Michigan Motor Vehicle Code is similar to the language defining "explosives" in the regulatory provisions of the federal legislation. See *supra*, note 4.

bomb or grenade, fire bomb, or similar device." 18 U.S.C. § 232(5). The defendants and the government disagree as to whether "similar device" includes the naphtha soaked newspapers employed by Bennett. In this case the legislative history and the expert testimony illuminate the reach of section 232(5). First, there need only be a potential for explosion. And second, Congress understood the term "bomb" to cover a wide range of explosives. As previously noted, there was testimony before the House Judiciary Subcommittee that considered the legislation that Congress understood the terms "bomb" and "incendiary device" to cover a wide range of explosives.

In this case the witness Thomas Cousins, while testifying as an expert for the government, described the characteristics of an incendiary device as a group of components designed to spread and direct fire, with a source of ignition and no industrial application. (Record, vol. 7, at 988-89). Cousins concluded that the system of naphtha soaked newspaper directing fire to equipment in combination with the flaming newspaper used for igniting the system constituted an incendiary device.

The trial judge correctly submitted the theory of incendiary device to the jurors.

Based upon the circumstances of this case, the plain meaning of the statute and its legislative history, and the expert testimony offered at trial the defendants were properly convicted under the provisions of 18 U.S.C. § 844(i) and the judgment of the district court is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Harold GERE, Defendant-Appellant.
No. 80-1771.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 10, 1981.
Decided Nov. 13, 1981.

Before WRIGHT and WALLACE, Circuit Judges and CARROLL, District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

The appellant was convicted by a jury of two counts of mail fraud and one count of violation of 18 U.S.C. § 844(i), all in connection with the arson of the building housing his two businesses. On appeal, he alleges error in admission of coconspirator hearsay, in failure to give a requested immune witness instruction, in failure to give *sua sponte* an accomplice instruction and in application of § 844(i) to what was simply arson.

I.

Gere's building was a warehouse containing offices and storage space. It housed his retail and wholesale office and photocopier supply businesses.

* Of the District of Arizona.

The building and its contents burned on May 12, 1979. Firemen and investigators determined from marks on the floor, burn patterns in wood and other materials, and the loci of the fires within the warehouse that the fire had been "set" for delayed ignition from outside the cargo door of the building with the use of "trailers" of photocopier fluid and fluid-soaked materials. The "trailers" were in effect fuses running from the point of ignition into the warehouse.

Gere was connected to the fire by circumstantial evidence. He was the last person in the warehouse before the fire.

His motive was proved by evidence that his retailing business had been undermined by litigation against him for unfair telephone sales practices. Testimony relating out-of-court statements by his general manager, Martin Whiter, was introduced to prove that Gere wished to get out of the business. Whiter and others testified to off-record cash sales of inventory by Gere and Whiter at discount prices. Whiter's out-of-court-statements were again used to explain that Gere's intent was to take cash from the business without showing a decrease in inventory. The "paper" inventory's destruction would result in a second payment with insurance proceeds.

Before the fire, Gere arranged a loan secured by inventory. At about that time, an endorsement was added to the fire insurance policy providing for repayment to the bank in the event of destruction of the secured inventory. "Junk" inventory stored at another location was moved into the building.

Morris Singer, an acquaintance in the fire reconstruction business, testified to a conversation with Gere at a club they frequented, where Gere asked if he "knew of someone who could make a fire." Though Gere argues that this was only casual conversation, Singer approached at least

one person about the possibility of setting the fire.

After the fire, Gere made a request by mail for an advance against his claims under his fire insurance policy. In another mailing he swore that he did not cause the loss.

Gere and Whiter were indicted on four counts: (1) conspiracy to commit mail fraud and violate § 844(i), (2) mail fraud based upon the requested advance, (3) mail fraud based upon the sworn proof of loss, and (4) violation of § 844(i) by use of an "explosive" to destroy the building, resulting in the death of one fireman and the injury of 24 others.

At the close of the evidence, Whiter's motion for acquittal on all counts was granted. The conspiracy count was dismissed as to both defendants. The jury returned a verdict against Gere on the remaining counts.

II.

A. *Coconspirator Hearsay*

Whiter's out-of-court statements were allowed before the jury under the coconspirator hearsay exception. Preceding the testimony, the court cautioned the jury that it was admitted subject to the finding of a conspiracy between Whiter and Gere. The jurors were instructed to "compartmentalize" the testimony they were to hear and not consider it until they were convinced beyond a reasonable doubt that there was a conspiracy. Concurrently, the judge instructed that the conspiracy had not yet been proved.

Before closing arguments, the court told the jury that sufficient evidence had not been presented from which it could find beyond a reasonable doubt that there was a conspiracy between Whiter and Gere. It then dismissed the first count of the indictment. The court made no specific

reference to the effect of this finding on the testimony previously heard. Defense counsel did not object, or refer in closing argument to the effect of the court's no-conspiracy finding upon testimony previously presented.

Because timely objection was not made, the "plain error" standard of review is to be applied. Fed.R.Crim.P. 30; *United States* v. *Krasn*, 614 F. 2d 1229, 1235 (9th Cir. 1980). We are to decide whether it is plain error not to give a final "connecting up" instruction regarding the effect of a no-conspiracy finding upon hearsay testimony conditionally admitted under the coconspirator exception to the hearsay rule.

The appellant argues that before hearsay declarations go before the jury, the judge is required to make a determination on the record whether the government has sufficiently proved conspiracy and to rule on the ultimate admissibility of the testimony. Because of failure to do so, the jury was allowed to consider hearsay testimony.

Where hearsay testimony is conditionally introduced, we have required that the trial judge make the ultimate determination of whether a foundation has been established. *United States* v. *Eubanks*, 591 F. 2d 513 (9th Cir. 1979); *United States* v. *Weiner*, 578 F. 2d 757 (9th Cir.), *cert. denied*, 439 U.S. 981, 99 S. Ct. 568, 58 L. Ed. 2d 651 (1978). Before the testimony will be allowed to go to the jury, the prosecution must show that (1) the declaration was in furtherance of the conspiracy, (2) it was made during the pendency of the conspiracy, and (3) there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant to it. *Weiner*, 578 F. 2d at 768.

The quantum of independent proof required for the third element of the foundation requirement is "sufficient, sub-

stantial evidence to establish a prima facie case." *Weiner,* 578 F. 2d at 768. We have recently emphasized the importance of the first element in *United States* v. *Fielding,* 645 F. 2d 719 (9th Cir. 1981), holding that mere descriptions of the conspiracy to a nonconspirator are not "in furtherance of" the conspiracy.

[1] The trial judge may make a preliminary determination of admissibility or may admit the testimony conditionally, subject to "connecting up" with the foundation to be eventually laid by the prosecution. *United States* v. *Zemek,* 634 F. 2d 1159, 1169 (9th Cir. 1980), *cert. denied,* 450 U.S. 916, 101 S. Ct. 1359, 67 L. Ed. 2d 341 (1981) and —— U.S. ———, 101 S. Ct. 1525, 67 L. Ed. 2d 821 (1981).

When there has been sufficient evidence to sustain a finding of conspiracy, we have held that giving an instruction like that given here not reversible error. We have called such an instruction "unduly generous." *United States* v. *Miranda-Uriarte,* 649 F. 2d 1345, 1351 n. 4, 1353 (9th Cir. 1981); *United States* v. *Lutz,* 621 F. 2d 940, 946 n. 2 (9th Cir.), *cert. denied,* 449 U.S. 859, 101 S. Ct. 160, 66 L. Ed. 2d 75 (1980) and 449 U.S. 1093, 101 S. Ct. 890, 66 L. Ed. 2d 822 (1980); *United States* v. *Testa,* 548 F. 2d 847, 853 n. 3 (9th Cir. 1977).

It is generous when the judge finds sufficient evidence to take the conspiracy count to the jury. Though there is enough evidence to permit the admission of the coconspirator hearsay, the judge thereby imposes the further requirement that the jury find conspiracy beyond a reasonable doubt before considering the hearsay testimony. In this circumstance, whether the jury performs this mental gymnastic is of little consequence, since the coconspirator hearsay is properly admitted anyway.

But, when the instruction is given preliminary to the conditional admission of the testimony, and no more is said except that the judge finds no conspiracy, whether the jury then strikes the testimony from its consideration is crucial. The danger of its not doing so is that it may consider inadmissible hearsay.

[2] In this situation (where conspiracy has been charged, testimony conditionally admitted with an instruction that the jury is not to consider it until conspiracy is found beyond a reasonable doubt, and a no-conspiracy finding is later made and the count dismissed) we believe greater caution should be used to assure that the jury adequately connects up the no-conspiracy finding with the previously admitted testimony. The jury should be instructed to ignore the specific items of testimony conditionally admitted.[1]

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1. Our analysis is consistent with the *Federal Rules of Evidence.*

Though we have not explicitly said so, the preliminary determination of admissibility is for the judge under Rule 104(a). Rule 104(a) codifies the law of this circuit that has existed since before the Rules' promulgation. *See Carbo* v. *United States,* 314 F. 2d 718, 735-38 (9th Cir. 1963).

The trial judge fulfills his Rule 104(a) responsibility when he allows a conspiracy count to go to the jury, even though he may not explicitly find on the record that the foundation requirement has been fulfilled or instruct the jury that it may consider the coconspirator hearsay statements. It is within the judge's discretion not to make such statements because of their potential for prejudice. When the judge finds, ex-

(Footnote continued on following page)

[3] The question here, however, is whether the trial judge's failure to so instruct constituted plain error. We hold that it did not.

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1. *Continued*

plicitly or implicitly, that the foundation has been laid, the defendant cannot complain if he then imposes the further requirement that the jury consider the coconspirator hearsay statements only if it finds conspiracy beyond a reasonable doubt. *See, e.g., United States* v. *Miranda-Uriarte, supra.*

The judge fulfills his Rule 104(a) responsibility when he makes an explicit finding that the government has not introduced evidence sufficient to lay the foundation for admissibility or when he instructs the jury not to consider the coconspirator statements.

See generally Marcus, Co-Conspirator Declarations. The Federal Rules of Evidence and Other Recent Developments. From a Criminal Law Perspective, 7 Am. J. Crim. L. 287 (1979); Comment, *The Impact of Federal Rule of Evidence 104 on the Conconspirator Exception to the Hearsay Rule,* 28 Emory L. J. 1115 (1979).

The judge here explicitly found that there has not been introduced enough evidence for the jury to find conspiracy beyond a reasonable doubt. If connected immediately to the instruction given before the prior conditional admission of coconspirator hearsay statements, this would signal to the jury that it could not consider those statements to determine Gere's guilt on the remaining counts. With this no-conspiracy finding, the judge fulfilled his Rule 104(a) responsibility.

The narrow issue we decide is whether, in addition to the pre-admission instructions and the no-conspiracy finding and in the absence of objection or request, the judge was required to describe specifically the effect of the no-conspiracy finding on the previous testimony.

The conditionally admitted testimony largely described Gere's bleeding cash from the business, suggesting an intent to exploit the destruction of the inventory by presenting a false picture of its amount. But, this was not the only evidence of the cash sales nor was it the only evidence suggesting Gere was responsible for the arson. On these facts the district judge did not commit plain error.

B. *Immune Witness Instruction*

Gere argues that Morris Singer thought he was testifying under immunity from prosecution and that the court should have given a requested immunized witness instruction.

The court entertained a proposed immune witness instruction. It declined to give that, but promised to give its "substance." Gere's counsel argued that the court would instruct the jury to consider Singer's testimony as if he were an immune witness. After instructions were given and before the jury retired, Gere objected to the instruction given.

[4-6] A trial judge is given substantial latitude in tailoring instructions so long as they fairly and adequately cover the issues presented. The adequacy of the entire charge is to be reviewed in the context of the whole trial. Challenges pertaining only to the trial judge's language or formulation of the charge are reversible only for abuse of discretion. *United States* v. *James*, 576 F. 2d 223, 226-27 (9th Cir. 1978).

There is doubt Mr. Singer in fact believed he was an immune witness. He denied in his testimony any explicit or implicit agreement with the government.

[7] Assuming he did believe he was immunized, the question is whether the trial judge abused his discretion in

not giving verbatim the instruction requested by the defense.

Reviewing the record, we believe the "substance" agreed upon was that Singer's testimony should be considered with caution if he in fact believed he was an immunized witness. The court expressed doubt that Singer thought he was immunized, but agreed to instruct in reference to his testimony. It instructed the jury to view Singer's testimony with suspicion if it found Singer believed himself immunized, though it interjected language suggesting Singer could be equated to other witnesses who said they believed they would not be prosecuted. Gere argues that this interjection made the instruction ambiguous.

The instruction might have been better framed, but in light of the rest of the charge, it was not an abuse of discretion.

C. *Accomplice Instruction*

Gere argues that, because Whiter was accused of being an accomplice and because Singer thought he could be accused, the court by its own motion should have given an accomplice instruction in reference to their testimony. Though it did not give an accomplice instruction, the court did give one on general credibility.

[8, 9] It is settled in this circuit that where an accomplice instruction is not requested, it is not plain error not to give one *sua sponte*. *DeCarlo* v. *United States*, 422 F. 2d 237, 240-41 (9th Cir. 1970); *United States* v. *Johnson*, 416 F. 2d 653, 655 (9th Cir. 1969), *cert. denied*, 396 U.S. 1019, 90 S. Ct. 588, 24 L. Ed. 2d 511 (1970).

The district court's failure to give an accomplice instruction on its own motion was not plain error.

D. *Section 844(i)*

Section 844(i) provides penalties for destruction of a building used in interstate commerce "by means of an explosive." The penalty is more severe when a person has been killed or injured.

"Explosive" is defined in § 844(j) as including, among other things, "explosive and incendiary devices" within the meaning of 18 U.S.C. § 232(5).

According to § 232(5), "explosive or incendiary device" means

> (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick. . . .

Gere argues that § 844(i) was not meant to be a federal arson statute but instead should be narrowly construed within the scope of the purpose for which it was formulated. We agree.

The legislative history of § 844(i) describes congressional concern with bombings rampant in the 1960's and '70's. Though there is language suggesting broad jurisdiction, it relates to buildings in interstate commerce and not to the manner by which they are destroyed. The cross-reference to § 232(b), which appears to bring within the section "molotov cocktails" and similar devices, should not be read to broaden the section's reach as the government proposes.

[10, 11] The purpose of the section was to protect buildings against the specific evil of bombing. There is no indication that it was meant to overlap state arson law relating to buildings in interstate commerce. *Cf. United States v. Hepp*, 656 F. 2d 350 (8th Cir. 1981) (leaking LNG meter allowed to explode). We reverse Gere's conviction of a violation of § 844(i).

AFFIRMED in part, REVERSED as to the § 844(i) count and REMANDED for imposition of corrected sentence. The mandate will issue now.

CARROLL, District Judge, dissenting:

I concur in the reversal of Gere's conviction of violating 18 U.S.C. § 844(i).

I would also reverse the mail fraud counts and remand for a new trial as to those counts. In my view, the totality of the instruction problems about which Gere complains affected his substantial rights to a fair and impartial trial.

A significant portion of the government's case against Gere involved statements made by the putative co-conspirator and conditionally admitted pending establishment of the conspiracy. Gere moved for a mistrial when the conspiracy count was dismissed. The motion was based on the nature and extent of the con-conspirator statements heard by the jury during the four and one-half weeks trial. The court denied the motion, but agreed to further instruct the jury to the effect that Gere could not be convicted on the basis of what the dismissed co-conspirator said or did. The court did not provide counsel with a copy of the proposed instruction, nor did it state on the record the full text of any instruction.

The court failed to give the cautionary instruction in its charge and trial counsel failed to make an additional request or objection before the case went to the jury. Under these circumstances, I would find reversible error. Fed. R. Crim. P. 52, *Ramer* v. *U.S.*, 390 F. 2d 564, 580 (9th Cir. 1968). *See also U.S.* v. *Kelinson*, 205 F. 2d 600, 601-602 (2nd Cir. 1953).

This court's opinion sets forth the background for Gere's second problem with the trial court's instructions having to do with the so-called immune-witness instruction. The trial court had agreed to give the "substance" of an instruction requested by Gere but did not advise counsel as to the text of the court's proposed revision either before argument or the giving of the "substance" instruction to the jury. Again, the problem arises from counsel not having an opportunity to object in a meaningful and timely manner. An appellate court is then left to resolve what the trial court "agreed" to do, and decide whether the defendant was prejudiced by the instruction as given. The procedure in this instance would appear in conflict with the provisions of Fed. R. Crim. P. 30 that "The court shall inform counsel of its proposed action upon the requests [of counsel] prior to their arguments to the jury . . ."